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No. 93-376

In the Supreme Court of the United States

OCTOBER TERM, 1993

KEY TRONIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

ANNE S. ALMY
DAVID C. SHILTON
M. ALICE THURSTON
EILEEN T. MCDONOUGH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

39 pp

QUESTION PRESENTED

Whether the provision in Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a), that allows a private party to recover the "costs of response" to pollution at designated sites, implicitly authorizes the recovery of attorney fees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 984 F.2d 1025. The opinion of the district court (Pet.App. B1-B15) is reported at 766 F. Supp. 865. A related opinion of the district court (J.A. 14-39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1993. A petition for rehearing was denied on June 7, 1993. Pet. App. E1. The petition for a writ of certiorari was filed on September 7, 1993, and was granted on December 13, 1993.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] The petition for a writ of certiorari also sought review of the related case of *Stanton Road Associates* v. *Lohrey Enterprises*,

STATUTORY PROVISIONS INVOLVED

The appendix, *infra*, sets forth the text of Sections 101(25) and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9601(25) and 9607(a).

STATEMENT

1. This case involves the Colbert Disposal Site in Spokane County, Washington. During the 1970's, the operator of that site disposed of hazardous waste it accepted from several parties, including both petitioner and the United States Air Force. After the Washington Department of Ecology (WDOE) discovered in 1980 that water wells near the site were contaminated, and after various neighbors of the site sued petitioner,[2] petitioner began to investigate the extent of the contamination and took some initial steps in response. WDOE and

984 F.2d 1015 (9th Cir. 1993), *reprinted in* Pet. App. C1-C20. On December 16, 1993, the Clerk of the Court, upon receipt of a joint stipulation, dismissed the writ of certiorari as to *Stanton Road* pursuant to Rule 46.1 of this Court. 114 S. Ct. 652.

[2] After a jury trial, those parties secured a judgment against petitioner and the County in which the site was located for $384,777.99, which was affirmed on appeal. See *Wilson* v. *Key Tronic Corporation*, 701 P.2d 518, 528-529 (Wash. Ct. App. 1985). When petitioner sought to recover some of its share of those costs from the United States, a federal district court concluded that petitioner was responsible for 90% of the contamination, and hence held that the obligation of the United States was limited to 10% of the sum for which petitioner was held liable in the *Wilson* case. *Key Tronic Corporation* v. *United States*, No. C-87-20-JLQ (E.D. Wash. Nov. 7, 1989) (Clerk's Record item 40, Exhibit 1).

the federal Environmental Protection Agency (EPA) also took action. By December 1987, the regulatory agencies had expended a total of more than $900,000 in responding to contamination at the site. To recover those costs, the agencies instituted formal proceedings against Key Tronic, the County of Spokane, and the Air Force. See Pet. App. A2; J.A. 15-16; Administrative Order on Consent and Interagency Agreement at 3, *In re Colbert Landfill, Spokane County, Washington* (EPA No. 1090-01-25-107) [hereinafter *Air Force Consent Order*];[3] *Wilson* v. *Key Tronic Corporation*, 701 P.2d 518, 521 (Wash. Ct. App. 1985).

The proceedings against the Air Force were resolved by an administrative consent order entered by EPA pursuant to the de minimis settlement provision of CERCLA, 42 U.S.C. 9622(g). Under that order, the Air Force agreed to pay $1.45 million to EPA to resolve whatever CERCLA liability it might have had because of its activities at the Colbert Site. As required by Section 9622(g)(1)(A), the order included findings—to which petitioner did not object—that the Air Force's activity at the site was minimal in comparison to that of other parties. In accordance with Section 9622(g)(5), the order indicated that the Air Force "shall not be liable for claims for contribution for [matters covered by the order] by any other person." *Air Force Consent Order*, *supra*, at 3-6, 12; see Pet. App. A2; J.A. 16-17.

The proceedings against petitioner were resolved by a consent decree entered in an action the regulatory agencies brought against petitioner and the County of Spokane in the United States District Court for the Eastern District of Washington. That document ex-

[3] That document appears in the record as Exhibit 1 to Clerk's Record item 23.

pressly noted the concurrent consent order agreed to with the Air Force, required petitioner to pay $4.2 million toward the cost of cleaning up the site, and required the County to implement the cleanup. Consent Decree at 4, 18-19, *State of Washington* v. *County of Spokane*, Civ. No. 89-033-RJM [hereinafter *Petitioner's EPA Consent Decree*][4]; see Pet. App. A2; J.A. 16-17.

2. Petitioner subsequently filed this suit against a variety of parties (including the United States) in the United States District Court for the Eastern District of Washington, seeking contribution under CERCLA for the costs it incurred pursuant to its settlement, as well as attorney fees and additional response costs that it claimed it had incurred independently. When the United States responded that the Air Force's consent order protected it from liability for contribution toward the costs of matters covered by the consent order, petitioner limited its claim against the United States to certain matters it viewed as being beyond the scope of the consent order. In an August 9, 1990 opinion (J.A. 14-39), the court ruled that petitioner was entitled to pursue recovery against the United States of response costs that it claimed it had incurred independently of the response of the regulatory agencies to problems at the site. J.A. 20-27.

In response to that decision, petitioner and the United States entered into a consent decree, under which the United States agreed to pay to petitioner $185,000 toward response costs petitioner had incurred before entry of the consent decree between petitioner and EPA. Consent Decree at 1, Clerk's Record item 92 [hereinafter *Response Cost Consent Decree*]. The parties were

[4] That document appears in the record as Exhibit 4 to Clerk's Record item 23.

unable to agree, however, on whether the United States was obligated to reimburse petitioner for certain specified attorney fees petitioner had incurred. Accordingly, the decree excepted the following claims from the settlement:

> A. Costs and fees incurred by attorneys and investigators for [petitioner] in the amount of $365,649 during [petitioner]'s search for additional potentially responsible parties and costs and fees incurred by attorneys related to the negotiation of [Petitioner's EPA Consent Decree];
> B. The salary of [petitioner]'s General Counsel and Secretary in the amount of $70,000, for time spent supervising the search for additional potentially responsible parties and negotiating [Petitioner's EPA Consent Decree];
> C. Attorneys' fees and costs incurred by [petitioner] in the prosecution of this action [$73,500]; and
> D. Prejudgment interest on the excepted claims [$12,000].

Id. at 2-3 (quoted at Pet. App. B3-B4). After briefing and oral argument, the district court concluded in a 1991 opinion (Pet. App. B1-B15) that the United States was liable to petitioner for the excepted claims. *Id.* at B6-B13.

3. A divided panel of the court of appeals reversed the award of attorney fees.[5] Pet. App. A1-A5. The relevant portion of the opinion relied entirely on the opinion in a related case, *Stanton Road Associates* v. *Lohrey*

[5] The government did not challenge the award of prejudgment interest.

Enterprises, id. at C1-C20. In that case, the court reviewed the applicable statutory language, which authorizes recovery of the "necessary costs of response" and defines "response" as "removal, remedy, and remedial action * * * includ[ing] enforcement activities related thereto." CERCLA Sections 107(a), 101(25), 42 U.S.C. 9607(a), 9601(25). The court noted the "American Rule" described by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975), under which "a prevailing party cannot recover attorneys' fees in the absence of congressional authority." Pet. App. C6. The court also considered (*id.* at C7) this Court's opinion in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), which stated that attorney fees are not recoverable "absent explicit congressional authorization," *id.* at 185. Relying on those cases, the court concluded that the reference to "enforcement activities" in Section 101(25) of CERCLA was not sufficiently explicit to justify an award of attorney fees. Pet. App. C7. Judge Canby dissented, both in the *Stanton Road* case, *id.* at C15-C20, and in this case, *id.* at A5.

SUMMARY OF ARGUMENT

The Court's decisions in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and *Runyon* v. *McCrary*, 427 U.S. 160 (1976), establish that federal courts may not award attorney fees to a prevailing party absent explicit statutory authorization. Because there is no explicit authorization for an award of attorney fees in this case, petitioner is not entitled to such an award.

1. The relevant provisions of CERCLA authorize petitioner to recover "necessary costs of response" and

define "response" to include "enforcement activities." CERCLA Sections 107(a)(B), 101(25), 42 U.S.C. 9607(a)(B), 9601(25). Those provisions do not refer to attorney fees directly and, standing alone, do not constitute the explicit authorization that *Alyeska* requires for a fee award.

2. The conclusion that Congress has not authorized an award of attorney fees in this case is bolstered by the presence of several unquestionably explicit authorizations in other provisions of CERCLA, including one provision enacted in the same statute that added the reference to "enforcement activities" on which petitioner relies. Congress's ready use of precise language in other circumstances counsels against concluding that the vague language on which petitioner relies authorizes an award of attorney fees in this case.

3. In any event, petitioner is not entitled to such an award because petitioner's suit does not constitute enforcement activity. In the area of administrative law, the term "enforcement" typically refers to an action brought by an administrative agency to enforce some directive of a statute it administers. Although the term in some cases might include actions a statute authorizes private parties to bring, we believe that the term when applied to CERCLA must be limited to actions that ensure that hazardous waste sites are cleaned up or shift the costs of pollution to polluters from society as a whole. Because petitioner's suit does not further those purposes, but rather is limited to reallocating the costs of pollution among polluters, we do not view it as enforcement activity under CERCLA.

CERCLA's use of similar phrases in other provisions supports our understanding of the meaning of "enforcement." The statute uses similar phrases—references to

enforcement actions, enforcement measures, and enforcement proceedings—almost exclusively to refer to actions taken to ensure that hazardous waste sites are cleaned up or to shift the cost of pollution to polluters. None of CERCLA's uses of forms of the verb "enforce" unambiguously includes actions—such as the suit here—that seek only to reallocate the cost of pollution among polluters. That pattern of usage suggests that our understanding, not petitioner's, correctly captures the intent of the statute.

Our understanding also is supported by the circumstances that occasioned enactment of the reference to "enforcement activities." Before that reference was added, there was a controversy whether the government could recover the cost of its enforcement activities. The addition of that reference resolved that controversy by giving the government an express entitlement to recover such costs.

4. Finally, petitioner is not entitled to recover the fees it seeks under an exception to the *Alyeska* rule for nonlitigation attorney fees. Even if such an exception exists, it would be limited to the "necessary costs of response" described in CERCLA Section 107(a), which include only fees incurred in activities directly related to the containment or cleanup of hazardous releases. Because none of the fees petitioner seeks are directly related to the protection of the environment, they would not be covered by any such exception.

ARGUMENT

BECAUSE CERCLA DOES NOT EXPLICITLY AUTHORIZE A PRIVATE PARTY TO RECOVER ATTORNEY FEES IN A SUIT TO RECOVER RESPONSE COSTS UNDER SECTION 107 OF CERCLA, THE DISTRICT COURT ERRED IN AWARDING ATTORNEY FEES IN THIS CASE

Although the rule in other common-law jurisdictions has been different, the Court has recognized since the eighteenth century that federal courts generally do not award attorney fees to the prevailing party. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247-250 (1975). As the Court explained in *Alyeska*, that rule started from the Court's early conclusion that federal courts did not have any inherent authority to impose an award of fees and was reaffirmed by a long course of congressional enactments specifying the types of costs that federal courts should award to the prevailing party. *Id.* at 250-258. Hence, by the time the Court decided *Alyeska* in 1975, Congress had enacted numerous "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Id.* at 260. Against that background, the Court held that it was inappropriate to imply "any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Ibid.*[6] Accord-

[6] For that reason, we see little relevance in the extended policy discussion offered by petitioner. As the Court explained in *Alyeska*, the existence of important public policies is not sufficient to justify judicial implication of authorization to award attorney fees:

> If the [policy at issue in *Alyeska*] * * * is a matter of the gravest importance, it would appear that a wide range of

ingly, federal courts can award fees to the prevailing party in federal litigation only when Congress has "carve[d] out specific exceptions to [that] general rule." *Id.* at 269. As the Court further explained two years later in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), federal courts should not assume that Congress "implicitly" intended to authorize fees: "absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation." *Id.* at 184, 185. A mere "generalized command" is insufficient. *Id.* at 186. Because petitioner cannot identify any explicit congressional authorization for an award of the fees it seeks in this case, its claim should fail under the austere reasoning of *Alyeska* and *Runyon*.

I. CERCLA DOES NOT EXPLICITLY AUTHORIZE AN AWARD OF ATTORNEY FEES IN A SUIT BY A PRIVATE PARTY TO RECOVER RESPONSE COSTS UNDER CERCLA SECTION 107

Section 107(a) of CERCLA establishes a cause of action against any party who is responsible for a hazardous substance problem covered by CERCLA; its four

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statutes would arguably satisfy the criterion of public importance and justify an award of attorneys' fees to the private litigant. And, if *any* statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions under 42 U.S.C. § 1983 seeking to vindicate *constitutional* rights?

421 U.S. at 264. It is not the role of the judiciary to balance petitioner's view (Pet. Br. 28) that the availability of attorney fee awards will encourage parties such as petitioner to engage in cleanup activity, against the contrary view that the availability of attorney fee awards will encourage litigation and resistance to enforcement activity.

numbered subparagraphs describe the types of defendants covered by the cause of action. 42 U.S.C. 9607(a)(1)-(4). Section 107(a)(A) then provides that a defendant in such an action (a responsible party) is liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan."[7] 42 U.S.C. 9607(a)(A).[8] In contrast, Section 107(a)(B)—the provision on which petitioner's action rests—authorizes the recovery of "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. 9607(a)(B). Section 101(25), in turn, defines "response" to mean "remove, removal, remedy, and remedial action;, [*sic*] all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. 9601(25).

None of those provisions refers directly to attorney fees, much less explicitly authorizes an award of attorney fees in cases such as this one.[9] Contrary to the

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[7] The national contingency plan was promulgated by EPA as a regulation pursuant to CERCLA Section 105, 42 U.S.C. 9605, and is codified at 40 C.F.R. Part 300.

[8] Although the court of appeals and petitioner have referred to the lettered subparagraphs of Section 107(a) as subdivisions of subparagraph (4) of Section 107(a), it is plain that each of the lettered subparagraphs actually applies to each of the numbered subparagraphs. Hence, we follow the more accurate practice of referring to the four lettered subparagraphs of Section 107(a) as subdivisions of Section 107(a) itself. Our practice is consistent with internal citations contained in CERCLA itself. See, *e.g.*, 42 U.S.C. 9607(f)(1) (referring to "subparagraph (C) of subsection (a) of this section").

[9] Both petitioner and its amicus rely heavily on *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989). That case, of course, in-

suggestion of petitioner's amicus (ARCO Br. 10 & n.11), the term "enforcement activities" in CERCLA Section 101(25) does not refer only to attorney fees, much less imply that all attorney fees are recoverable. For example, environmental regulators engaged in enforcement activity might incur substantial fees to third-party professionals (other than attorneys) for technical services involved in ascertaining and evaluating a party's compliance with orders issued by the regulators. Moreover, as we explain in Point III.C, *infra*, the term "enforcement activities" was added to the statute in 1986 to clarify that the government can recover its enforcement costs, not to establish a general right to attorney fees for prevailing parties in all CERCLA contexts.

II. THE INCLUSION OF EXPLICIT AUTHORIZATIONS OF ATTORNEY FEE AWARDS IN OTHER PROVISIONS OF CERCLA COUNSELS AGAINST AWARDING FEES IN THIS CASE, WHERE NO SUCH PROVISION APPLIES

As the Court explained in *Alyeska*, one of the most important bases for the canon of construction under which federal courts will not award attorney fees unless a statute explicitly authorizes such an award is the prevalence of statutes that include "specific and explicit provisions for the allowance of attorneys' fees." See *Alyeska*, 421 U.S. at 260 & n.33 (listing statutes that explicitly authorize an award of attorney fees).

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volved different provisions of CERCLA than those at issue here, and involved the clear statement rule the Court has discerned in the Eleventh Amendment context, rather than the American Rule articulated in *Alyeska*. Hence, we find nothing in that case that has direct relevance to decision of this case.

Because of the long tradition in this country against an award of attorney fees to the prevailing litigant, and because Congress in numerous instances has adopted language that indubitably authorizes an award of fees, federal courts should hesitate before concluding that a "generalized command" (*Runyon*, 427 U.S. at 186) was intended to authorize an award of attorney fees.

That concern applies with especial force here, because CERCLA itself contains several provisions that undoubtedly authorize awards of attorney fees. For example, the citizens suit provision in Section 310(f) of CERCLA provides that a court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate." 42 U.S.C. 9659(f). Similarly, Section 110(c) of CERCLA provides that the Secretary of Labor may award "a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees)" that an applicant incurs in connection with the whistleblower protection provisions of CERCLA. 42 U.S.C. 9610(c).

Also, it is not disputed that Sections 107(a)(A), 101(23), and 104(b) combine to authorize the federal government to recover all costs of response and enforcement that it incurs, including the cost of attorney time. As we explained above, Section 107(a)(A) establishes a cause of action against responsible parties for "all costs of removal or remedial action incurred by the United States Government." 42 U.S.C. 9607(a)(A). Section 101(23), in turn, defines "removal" to include "action taken under section 9604(b) of this title." 42 U.S.C. 9601(23). Finally, Section 104(b) authorizes EPA to "un-

dertake such planning, legal, fiscal * * * and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter." 42 U.S.C. 9604(b)(1).[10] Because the provision expressly authorizes the government to undertake "legal * * * studies or investigations," the provision authorizes the recovery of legal—*i.e.*, attorney—costs incurred in the course of the described activities.[11] Because CERCLA authorizes EPA to delegate authority under Section 104(b)(1) to "[a] State or political subdivision thereof or Indian tribe," CERCLA Section 104(d)(1)(A), 42 U.S.C. 9604(d)(1)(A), those entities have a similar entitlement to recover legal costs when they take actions pursuant to such delegations of authority.

Congress's express and repeated authorizations of attorney fee awards in CERCLA provide particularized support in this context for the inference the Court drew in *Alyeska*: because Congress has shown itself quite ready to authorize an award of attorney fees explicitly, the absence of an explicit authorization strongly suggests that Congress did not form an intent to authorize a fee award in a case such as this one. The timing of the enactment of the express attorney fee provision in

[10] The text of Section 9604(b)(1) refers to "the President," but the President has delegated the authority described in the text to the Administrator of the EPA. See 42 U.S.C. 9604 note (describing delegation of functions under Section 9604).

[11] See Pet. Br. 26-27 (agreeing that CERCLA authorizes recovery of fees by the United States). Since 1986, it has been clear that the reference to "response" actions in Section 104(b)(1)'s list of covered activities includes "enforcement activities related thereto." CERCLA Section 101(25), 42 U.S.C. 9601(25).

CERCLA Section 310(f) bolsters that inference considerably. That provision was added by Section 206 of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1703, the same statute that added to CERCLA Section 101(25) the reference to "enforcement activities" on which petitioner relies. See SARA § 101(e), 100 Stat. 1615 (amending 42 U.S.C. 9601(25)). That inference supports the determination of the court of appeals that petitioner was not entitled to the fees it sought in this case.[12]

III. A SUIT TO REALLOCATE THE COSTS OF POLLUTION AMONG POLLUTERS IS NOT A SUIT TO ENFORCE CERCLA

The principal contention of petitioner and its amicus Atlantic Richfield Company is that Congress explicitly authorized an award of attorney fees in cases such as this one when it included a reference to "enforcement activities" in the definition of "response." Pet. Br. 12-

[12] Our reading of CERCLA reflects a rational design of attorney fee awards, under which attorney costs generally are available for suits that further the primary purposes of CERCLA: ensuring that hazardous waste sites are cleaned up and shifting the costs of pollution to polluters. The two main types of suits that further those purposes are suits by government entities in their regulatory capacity and citizens suits seeking to enforce compliance with CERCLA. Because of the great potential for whistleblowers to reveal wrongful activity that otherwise would not be uncovered (and thus not be remedied), whistleblower suits serve those goals as well. By contrast, the suit in this case merely reallocates costs among polluters, a goal that is not in our view central to CERCLA's enforcement objectives (as we discuss in more detail in Point III.A, *infra*).

21; ARCO Br. 9-16.[13] Even if—contrary to our submission above—the reference to "enforcement activities" were thought to be sufficiently explicit on its own to justify an award of attorney fees in cases such as this one, petitioner's claim would fail because petitioner's suit is not part of the "enforcement activities" described in Section 101(25) of CERCLA.

A. CERCLA Is Enforced By Activities That Ensure That Hazardous Waste Sites Are Cleaned Up Or That Shift Costs To Polluters From Society As A Whole, Not By Activities That Reallocate The Costs Of Pollution Among Polluters

Petitioner's argument that CERCLA's reference to "enforcement activities" includes any suit whatsoever, so long as it is described by the statute, ignores the most common usage of the word "enforcement" in statutes that delegate responsibilities to administrative agencies—to describe suits by the agency to require compliance with orders issued under the authority delegated by the statute. See, *e.g.*, *Thunder Basin Coal Co.* v. *Reich*, No. 92-896 (Jan. 19, 1994), slip op. 7 (describing "pre- and post-enforcement challenges" and "enforcement proceedings" under the Federal Mine Safety and Health Amendments Act of 1977); see also 5 U.S.C. 703 (provision of Administrative Procedure

[13] Petitioner apparently does not argue that the attorney fees associated with negotiating the consent decree (a portion of the costs described in categories A and B of the costs at issue here, see page 5, *supra*) are recoverable as part of the costs of "enforcement activities." As we understand it, the only basis argued in this Court for recovery of those costs is that they are not covered by the *Alyeska* rule because they are nonlitigation attorney fees. See Pet. Br. 30-32. We address that argument in Point IV, *infra*.

Act referring to "civil or criminal proceedings for judicial enforcement"). The most likely source of the terminology adopted in Section 101(25) is that customary usage, rather than the broader definition urged by petitioner.[14]

To be sure, a reference to "enforcement" activities might not strictly be limited to actions brought by regulatory authorities; in some cases Congress relies on private parties to compel compliance with a statute in a manner that reasonably could be characterized as "enforcement" of the statute. But whatever may be the precise boundaries of the reference to "enforcement activities," we believe that the term cannot plausibly be applied to activities that do not directly further what we understand to be the primary goals of CERCLA: ensuring that hazardous waste sites are cleaned up and that the costs of pollution are borne by polluters as a group rather than society as a whole. Cf. Pet. Br. 18 (referring to "CERCLA's policy that the costs of cleanup be borne by polluters"). Once cleanup has been achieved and the costs of pollution have been shifted to polluters, CERCLA's enforcement has been completed.

Even if it is true that some actions by private parties under CERCLA might be characterized as enforcement actions (such as citizens suits under CERCLA Section 310), actions such as petitioner's suit—which seeks to shift the burdens of CERCLA from one polluter to another—further secondary goals that should not be char-

[14] The House Report that accompanied the portion of SARA that added the "enforcement" language to CERCLA offers an explanation consistent with our understanding of the concept of "enforcement." See H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. V, at 5 (1985) ("Under existing law, the primary responsibilities for cleanup and enforcement are vested in the President.").

acterized as "enforcement activities" covered by Section 101(25). Petitioner's argument that its suit to compel contribution is a suit to "enforce" CERCLA rests on the premise that a central goal of CERCLA is to ensure that polluters share costs in accordance with their proportionate responsibility.[15] Although CERCLA includes procedures under which private parties can attempt to reallocate their financial obligation in accordance with their share of responsibility, we do not view those procedures as furthering the primary thrust of CERCLA or as part of its enforcement activities. Most obviously, CERCLA imposes liability for the entire cost of cleanup on any single responsible party, without imposing any obligation that EPA pursue other responsible parties. CERCLA Section 107(a)(A), 42 U.S.C. 9607(a)(A) (imposing liability for "all costs of removal or remedial action" on "any person" who has a sufficient connection to the pollution). That focus on ensuring payment by some polluter in the first instance suggests that litigation among polluters to reallocate liability is not "enforcement" of CERCLA.

B. CERCLA Does Not Use Forms Of The Verb "Enforce" To Refer To Suits To Reallocate The Costs of Pollution Among Polluters

CERCLA does not refer to "enforcement activities" except in Section 101(25)'s definition of "response." Its use of related terms, however, supports our understanding of the meaning of that phrase. The most similar usages are the references in several provisions to enforcement actions, enforcement measures, and enforce-

[15] See Pet. Br. 24 (referring to "scheme of requiring all polluters to pay"); see also ARCO Br. 3 (referring to a responsible party's "statutory obligation to pay its share of response costs").

ment proceedings.[16] Consistently with our understanding of the term, those references describe actions taken to ensure the cleanup of hazardous waste sites and the shifting of the costs of pollution to polluters. None of those references describes actions to reallocate the costs of pollution among polluters.[17]

CERCLA also frequently uses various forms of the verb "enforce." The pattern of those usages supports our view that the term "enforcement activities" does not include actions brought by one polluter to shift to other polluters the costs of responding to contamination to which the plaintiff contributed.[18] A heavy pre-

[16] See, *e.g.*, 42 U.S.C. 9604(d)(1)(A) (authorizing EPA to authorize local governmental entities to "carry out * * * enforcement actions [related to actions taken by the entity under 42 U.S.C. 9605(a)(8)]"), 9606(b) ("action" by EPA "to enforce" an order issued by EPA), 9611(c)(3) (authorizing use of Superfund to "take enforcement * * * action against releases of hazardous substances"), 9611(c)(6) (authorizing use of Superfund for "enforcement measures"), 9613(a) (referring to "civil or criminal proceeding for enforcement"), 9613(h)(2) (referring to "action to enforce an order issued [by regulatory authorities]"), 9617(c)(2) (referring to "enforcement action" under 42 U.S.C. 9606), 9622(b)(4) (referring to "enforcement action" on behalf of the Superfund), 9622(e)(5) (describing EPA's authority "to undertake response or enforcement action"), 9651(h)(1)(F) (requiring EPA to report on "enforcement actions" it has undertaken), 9659(c) (granting jurisdiction over "actions * * * to enforce" rules issued under CERCLA).

[17] Although the provision in 42 U.S.C. 9622(f)(6)(C) allowing EPA to include in settlement agreements provisions for "future enforcement action under [42 U.S.C. 9606 or 9607]" could be construed to contemplate private party actions under Section 9607(a)(B), the context suggests that the reference is limited to government enforcement.

[18] As the text should make clear, our reading of the statute does not give the United States any particular entitlement to

ponderance of the references plainly refer only to the activities of government environmental regulators.[19] Although a few of the references—such as the reference in Section 101(25)—could be construed to include activities by other parties,[20] none of them expressly in-

fees not given to other similarly situated parties. In cases where an agency of the United States incurred costs in response to pollution to which that agency contributed, any attempt by the agency to recover attorney fees in a contribution action would be barred for the same reason petitioner's attempt should be barred in this case.

[19] See, *e.g.*, 42 U.S.C. 9604(b)(1) (referring to acts of the EPA "to enforce the provisions of this chapter"), 9604(e)(1) (authorization of officials designated by the President to take actions for "enforcing" CERCLA), 9606(c) (references to "enforcement * * * authorit[y]" established by Section 9606 and to "assignment of responsibility for * * * enforcement of standards and permits"), 9609(f) (referring to "President's authority to enforce any provisions of this chapter"), 9610(a) (referring to "enforcement" of whistleblower provisions of CERCLA), 9610(e) (same), 9620(e)(5) (referring to "enforcement status" of sites), 9621(e) (referring to enforcement of permits by appropriate State and Federal agencies), 9622(d) (section governing "enforce[ment]" of settlements entered into with EPA).

Several of the references that seem to contemplate only activities by environmental regulatory authorities seem less relevant because they use the term in different contexts. See 42 U.S.C. 9601(10)(J) (referring to "enforceable" requirements in a pretreatment program submitted by a local government for federal approval), 9604(d)(2) (authority of EPA to "enforce" a contract), 9604(d)(3) (authority of EPA to assist local government entity in "enforcement" of a contract).

[20] See, *e.g.*, 42 U.S.C. 9607(k)(4)(a) (obligating Secretary of the Treasury to specify standards to assure that private insurance will "carry out the purposes of this subsection in a reliable, enforceable, and practical manner"), 9620(a)(4) (referring to "State laws regarding enforcement"), 9621(d)(2)(B)(ii)(III) (requiring that proposed remedial action include "enforceable measures that will preclude human exposure to * * * contaminated groundwater").

cludes activities—like those at issue here— that seek only to reallocate costs among polluters rather than to shift them to polluters in the first instance.[21]

The absence from CERCLA's frequent references to "enforcement" of any reference that necessarily includes actions such as the one at issue here, coupled with the preponderance of references that could not plausibly include such an action, suggests that the term does not include actions to reallocate the costs of pollution among polluters.

C. The Circumstances Surrounding The 1986 Enactment Of The Reference To "Enforcement Activities" Do Not Indicate That Congress Intended That Provision To Cover Suits To Reallocate The Costs of Pollution Among Polluters

The provision on which petitioner relies was added to CERCLA by Section 101(e) of SARA, 100 Stat. 1615. That provision inserted a new clause into the definition of "respond" or "response," highlighted in the following quotation of the current provision:

> The terms "respond" or "response" means remove, removal, remedy, and remedial action;, *all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.*

42 U.S.C. 9601(25) (emphasis added).[22]

[21] One provision authorizes federal district courts to "enforce" settlement decrees entered into by EPA. 42 U.S.C. 9622(d)(3). In our view, that provision sheds little light on the question before the Court.

[22] Both the superfluous semicolon before the beginning of the new phrase and the lack of agreement between the subject and the verb of the main clause appear in the statute as currently

At the time that amendment was made, there was contemporaneous litigation regarding the government's ability to recover the costs of attorney time expended in enforcement activity.[23] Section 107(a)(A) of CERCLA covered only the "costs of removal or remedial action." 42 U.S.C. 9607(a)(A) (1982). The definitions of those terms (in CERCLA Sections 101(23) through (25), 42 U.S.C. 9601(23)-(25) (1982)) did not directly refer to enforcement, although the definition of "remove" included "the taking of such other actions as may be necessary to prevent, minimize or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." CERCLA Section 101(23), 42 U.S.C. 9601(23) (1982).[24]

As a result, although the government believed—and continues to believe—that Section 104(b)(1) and the

codified. See also 42 U.S.C. 9601 note regarding amendments to Paragraph (25) (describing errors in Section 101(f) of SARA, 100 Stat. 1616).

[23] See, *e.g.*, *United States* v. *South Carolina Recycling and Disposal, Inc.*, 635 F. Supp. 984, 1009 (D.S.C. 1984), aff'd in part and vacated in part, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); *United States* v. *Conservation Chemical Company*, 619 F. Supp. 162, 186 (W.D. Mo. 1985); *United States* v. *Northeastern Pharmaceutical and Chemical Company*, 579 F. Supp. 823, 851 (W.D. Mo. 1984), aff'd, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). Those courts concluded that CERCLA adequately demonstrated that Congress had intended for the United States to recover enforcement costs, including the costs of attorney time.

[24] The most obvious activity that would constitute enforcement activity, but not indubitably a response action under CERCLA's pre-SARA language, in that category would be an action under CERCLA Section 106(b)(1), 42 U.S.C. 9606(b)(1), to enforce orders entered under CERCLA Section 106(a), 42 U.S.C. 9606(a), to protect public health and welfare.

related provisions of CERCLA authorized recovery of the costs of enforcement activity, the litigation raised an issue whether the language of CERCLA adequately covered those costs. Given the wide variety of enforcement proceedings authorized under CERCLA (see note 16, *supra*), that lack of clarity had the potential to be quite detrimental to the funding of EPA's costly mission under CERCLA. The amendment neatly resolved that issue by expressly including "enforcement activities" within the definition of "response."

The House Report on the amendment supports that understanding. The Committee explained:

> The section also modifies the definition of "response action" to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties.

H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. I, at 66-67 (1985).[25] Nothing in that explanation supports petitioner's view (Pet. Br. 16-18; see ARCO Br. 12-13) that the amendment was intended to wreak a broad alteration in the framework for attorney fee awards under CERCLA. The difference between the House Report statement that the amendment was intended to "confirm" Congress' intent that the Government should recover its enforcement costs, and petitioner's contention that Congress intended to create a new right for private parties to recover attorney fees is readily apparent. Hence, although the discussion in the House Report is not dispositive, it does provide considerable sup-

[25] The House Report describes the amendment as directed at the definition of "response action," a term found in CERCLA Section 104(b)(1), 42 U.S.C. 9604(b)(1), but not found in the provision on which petitioner relies, CERCLA Section 107(a)(B), 42 U.S.C. 9607(a)(B).

port for the understanding of the provision we have offered, and strongly counsels against interpreting the language of the amendment as explicit authorization for attorney fee awards in cases such as this one.[26]

Contrary to petitioner's submission (Pet. Br. 16; see ARCO Br. 12-13), we see little significance in Congress's choice to include the reference to enforcement activities in a definition of the costs of "response," which are covered by the cause of action for private parties in Section 107(a)(B), rather than in the definition of the costs of "removal" or "remedial action," which are covered by the cause of action for government entities under Section 107(a)(A). First, as even petitioner admits (Pet. Br. 16), the somewhat odd phrasing of the amendment makes it clear that the reference to "enforcement activities" is included not only in the definition of the costs of "response," but also in the definition of the costs of "removal" and "remedial action." See CERCLA Section 101(25), 42 U.S.C. 9601(25) ("[A]ll such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto.").[27] Second, because the term "response" is de-

[26] The other two references to the amendments in the committee reports do little more than paraphrase the language of the statute, and thus shed little light on the question at hand; their ambiguity is no more instructive than the ambiguity of the statute Congress enacted. See H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. V, at 6 (1985) (describing subsection 101(d), the predecessor to SARA § 101(e)); H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 184 (1986). As the Conference Report explains, the Senate version of the bill did not contain a similar provision, and thus the Senate Report does not discuss the point. *Id.* at 185.

[27] The reference to "enforcement activities" in Section 101(25) plainly applies to government "response actions" authorized by Section 104, and to actions to recover such costs brought by the United States under Section 107(a)(A). Hence, there is nothing odd about the United States' reliance in the court of appeals on Section 101(25) as part of the basis for recovery by the United States of the costs of attorney time in enforcement actions. See Pet. Br. 13 (noting that reliance). As explained in the text, Section 104(b) establishes that the government may recover legal costs; the reference to Section 101(25) is necessary to make it clear that enforcement activities are among the types of response actions for which the costs described in Section 104(b) may be recovered. Conversely, because CERCLA Section 104(b) plainly does not apply here, petitioner can draw no substantial support for a fee award from the amendment to CERCLA Section 101(25).

fined to include "remove," "removal," and "remedial action," Congress could add the concept of enforcement activities to all of those defined terms most efficiently by making a single amendment to the definition of "response" in CERCLA Section 101(25).[28] The logistical benefits of making the change in a single amendment are a more plausible explanation for the placement of the change in Section 101(25) than petitioner's suggestion.

IV. THE ATTORNEY FEES SOUGHT BY PETITIONER ARE NOT OTHERWISE NECESSARY COSTS OF RESPONSE

Petitioner also argues (Pet. Br. 30-32)[29] that the at-

[28] Indeed, to the extent that Congress's precise purpose in expanding the definition of "response" was to clarify the breadth of the concept of the government's "response action" covered by CERCLA Section 9604(b)(1)—as the House Report suggests, see page 23 & n.25, *supra*—an amendment to the definitions of "removal" and "remedial actions" would not have been adequate.

[29] Petitioner further argues (Pet. Br. 29) that it is entitled to recover the fees it seeks under the common benefit exception to the American Rule. That argument was not presented to the court of appeals or in the petition and thus is not properly before the Court. See, *e.g.*, *Zobrest* v. *Catalina Foothills School District*, 113 S. Ct. 2462, 2466 (1993).

torney fees it seeks are recoverable because they are nonlitigation attorney fees, based on its view that the American Rule articulated in *Alyeska* covers only litigation-related attorney fees.[30] Whatever merit there may be to the view that the American Rule does not cover some category of "nonlitigation" attorney fees, this is not a suitable case in which to address that question because the fees sought by petitioner would not be recoverable under that exception.

Petitioner relies on the decision of the Tenth Circuit in *FMC Corporation* v. *AERO Industries, Inc.*, 998 F.2d 842 (1993). The panel in *FMC* reasoned that attorney fees that are not incurred in pursuing litigation are not covered by the *Alyeska* rule, and then determined that such fees would be "necessary costs of response" recoverable under CERCLA Section 107(a)(B) if they were "necessary to the containment and cleanup of hazardous releases." 998 F.2d at 848; see also *United States* v. *Hardage*, 982 F.2d 1436, 1447-1448 (10th Cir. 1992) (stating same rule in dictum). The *FMC* court explained that the claimant in that case sought recovery for "attorneys fees generated in designing and negotiating the removal action and in preparing and carrying out the work plan approved by the EPA," including "fees paid for negotiating and drafting contracts with environmental professionals who performed the removal work, negotiating changes to the work plan, and monitoring work progress." 998 F.2d at 848. Because some of those costs might have been "necessary response costs," the court remanded the matter to the district court to determine whether any of the claimed costs could be recovered under Section 107(a)(B). *Ibid.*

[30] That argument apparently was not presented to the court of appeals, and thus is not squarely before the Court. We nevertheless address it here because it arguably was raised in the petition, Pet. 11-12.

None of the fees at issue in this case are covered by the rule articulated in *FMC*, which must in our view be limited to costs directly related to remedying pollution, as opposed to costs incurred in resisting responsibility or attempting to shift liability to third parties. First, and most obviously, category C of the claims[31] would not be covered, because that category covers fees "incurred * * * in the prosecution of this action." *Response Cost Consent Decree, supra*, at 3.[32]

Petitioner also seeks recovery for costs incurred in searching for potentially responsible parties, whether incurred by outside attorneys or by its general counsel (included in categories A and B of the claims, respectively). Those activities contributed nothing to the containment and cleanup of hazardous releases at the site; petitioner's status as a responsible party under Section 107(a) makes petitioner liable for the entire cost of the cleanup without regard to the existence, location, or solvency of other potentially responsible parties. Nothing in the definitions of "removal," "remedial action," and "respond" in CERCLA Sections 101(23), (24), and (25) suggests that those costs should be covered when incurred solely for the purpose of reallocating costs among polluters. Accordingly, those costs are not recoverable under the *FMC* rationale.

Finally, petitioner seeks to recover costs incurred in negotiating the consent decree, whether incurred by outside counsel or by its general counsel (included in categories A and B of the claims, respectively). Although

[31] The covered claims are set out in full at page 5 of this brief and at Pet. App. B3-B4.

[32] The petition comes close to conceding the point, by arguing at Pet. 12 n.14 that the other two types of costs were recoverable without referring to the category C costs.

that poses a closer question, we believe that the district court plainly erred in granting summary judgment for petitioner with respect to those costs. To the extent those costs were incurred in resisting EPA's attempt to enforce the statute, as appears to be the case, the costs did not contribute to the cleanup or containment of hazardous substances. See *Hardage*, 982 F.2d at 1448 (costs incurred in "investigating remedial alternatives" not recoverable because "costs [a private party incurs] in developing its own remedy, solely to defend against the government's *** action" are not "necessary" within the meaning of CERCLA). If the costs had been incurred in the voluntary design of a remedy, as opposed to criticizing and opposing a remedy proposed by the applicable government agency, recovery might be available under the *FMC* rule. See *FMC*, 998 F.2d at 848 (remanding for consideration by district court of costs that included "attorney fees generated in designing *** the removal action").[33] Because the fees were incurred in resisting the enforcement of CERCLA by EPA, however, they did not contribute to remedying pollution at the site and thus are not necessary costs of response.[34]

[33] We understand the references in *FMC* to "negotiating" the removal action to refer to negotiations with contractors who conducted the removal action, not to negotiation with EPA over the requirements of the removal action. See 998 F.2d at 848 (describing costs of "negotiating and drafting contracts with environmental professionals who performed the removal work").

[34] On that point, it is our understanding that the settlement compensates petitioner for the fees it incurred to professionals other than attorneys in the course of evaluating the remedy proposed in the consent decree. See Affidavit of David L. Powers, J.A. 11 (describing fees paid to Dames and Moore and Landau Associates, Inc.). We understand the dispute to cover only the fees payable for the time of its general counsel and to Perkins Coie for its work on that issue. See *ibid.* (describing fees paid to Perkins Coie).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

ANNE S. ALMY
DAVID C. SHILTON
M. ALICE THURSTON
EILEEN T. MCDONOUGH
Attorneys

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APPENDIX A

§ 9601. Definitions

For purpose of this subchapter—

* * * * *

(25) The terms "respond" or "response" means[2] remove, removal, remedy, and remedial action;,[3] all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

* * * * *

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incinceration vessel owned or operated by another party or entity and containing such hazardous substances, and

---

[2] So in original. Probably should be "mean".

[3] So in original.

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incinceration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined

with reference to the date on which interest accruing under this subsection commences.

* * * * *

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